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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. JOHN WILLIAM BOVIE, Defendant and Appellant.	C061301 (Super. Ct. No. P06CRF0326)

Pursuant to a plea bargain, defendant John William Bovie pleaded no contest to a felony charge of maintaining a place for selling, giving away or furnishing a controlled substance. (Health & Saf. Code, § 11366.) Subsequently, defendant moved to withdraw his plea on the ground that neither the court nor defense counsel had advised him that he would be banned from owning firearms for an indefinite period under federal law. (18 U.S.C. § 922(g)(1).) The trial court denied the motion to withdraw the plea, but issued a certificate of probable cause.

On appeal, defendant claims the trial court erred in refusing to allow him to withdraw the plea based on his attorney's ineffective assistance of counsel and/or the trial

court's failure to advise him of the federal firearm prohibition and (2) the fines and fees imposed are incorrect. We shall correct the monetary sanctions, and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On December 21, 2005, El Dorado County narcotics officers searched the residence that defendant shared with codefendant Justin Bovie,[2] who was on searchable probation. The officers found 101 packages of marijuana totaling 44.17 pounds, indoor and outdoor areas for marijuana cultivation, paperwork consistent with pay/owe records, physician medical marijuana recommendations with defendant's name, including one that appeared altered, a caregiver's or grower's statement from a marijuana cooperative, miscellaneous information related to medical marijuana, a triple beam scale, and pills in a prescription bottle missing its label. When questioned by one of the officers, defendant admitted to altering one of his medical marijuana recommendations. He also explained that he had run toward the garage when the officers approached because he "believed he had too much processed marijuana and he wanted to get rid of some of it."

The district attorney charged defendant with two felonies: possession of marijuana for sale (Health & Saf. Code, § 11359)

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[1] Our statement of facts is taken from the preliminary hearing transcript and plea proceedings.

[2] Justin Bovie is not a party to this appeal.

and unlawful cultivation of marijuana (*id.*, § 11358). Defendant was also charged with three misdemeanors: unlawful alteration of medical records (Pen. Code, § 471.5) and two counts of possession of controlled substances without a prescription (Bus. & Prof. Code, § 4060).

Pursuant to a plea bargain, defendant pleaded no contest to an added felony charge of maintaining a place for selling, giving away or furnishing a controlled substance. (Health & Saf. Code, § 11366.) The agreement included a provision that defendant would serve three years on formal probation. The probation terms included a year in the county jail, 90 days of which would be served in actual custody and the balance in an alternative sentencing program. The parties agreed that if defendant successfully completed probation and filed a motion to reduce the felony to a misdemeanor (Pen. Code, § 17, subd. (b)), the district attorney would not oppose it. The remaining charges would be dismissed.

Defendant signed a plea form acknowledging his understanding of the terms of the plea and the waivers of his rights. The trial judge explained the terms of the plea to defendant, who then orally entered the plea. Defendant's attorney, Michael Atwell, affirmed that he had had sufficient time to "go over the nature and consequences" of the plea with defendant.

On the day of sentencing, Attorney Atwell made an oral motion to withdraw the plea on the ground defendant

"was not advised of an exceptionally important consideration, namely, that he would suffer a lifetime firearms ban under the current federal law, even if his offense[] [was] reduced to a misdemeanor." The court did not proceed on the motion, but agreed to hear it at a later date. The court sentenced defendant in accordance with the agreement, but stayed its imposition to permit defendant a full hearing on the motion to withdraw.

At Attorney Atwell's request, the court relieved him as defense counsel and appointed conflict counsel, who filed the written motion to withdraw the plea. Defendant's motion was based on two arguments: (1) The court erred in failing to advise defendant that his plea would result in the loss of his right to own or possess firearms under federal law because it was a direct consequence of the plea, and (2) Attorney Atwell was ineffective for not advising defendant that by accepting the plea, he would permanently lose his right to own or possess firearms under federal law.

Defendant filed a declaration alleging that Attorney Atwell told him that if he accepted the plea bargain, the charge would be reduced to a misdemeanor upon completion of probation, and that reduction would reinstate all of his rights, which defendant assumed included his right to possess firearms. Defendant alleged that 10 minutes before sentencing, his attorney advised him that, even if the felony was reduced to a misdemeanor, federal law would forever bar him from owning or

possessing firearms. Defendant claimed that since he was a lifelong hunter and fisherman he would never have agreed to the plea bargain had he known of the federal ban, and would have instead gone to trial. Defendant claimed that he had medical marijuana cards for himself and two others, possessed 27 plants, and believed he was operating within county medical marijuana guidelines.

The district attorney filed written opposition arguing that the federal firearms ban was not a direct consequence of the plea because it required an intervening act of the federal government, and that defendant failed to show prejudice from his attorney's alleged malfeasance.

The court held a hearing on the motion. After defendant waived the attorney-client privilege, Attorney Atwell testified. He stated that he never discussed federal law with defendant prior to entry of the plea. While going over the plea form with defendant, he explained there was a *state* firearms ban for convicted felons and that if defendant succeeded in reducing his conviction to a misdemeanor, he could then possess firearms. Defendant's response was "that he was an avid hunter and it was a matter of some concern to him, [but] he indicated that he felt he could live with it."

The court denied defendant's motion on the basis that the federal firearms ban was a collateral rather than a direct consequence of the plea. The court made no ruling on the ineffective assistance of counsel claim. After obtaining a

certificate of probable cause, defendant appeals from the judgment.

DISCUSSION

I. Ineffective Assistance of Counsel

Defendant claims that counsel's failure to advise him of the federal firearms ban, a matter that was clearly important to him, deprived him of effective assistance of counsel, thereby entitling him to withdraw his plea. Although the trial court failed to make a ruling on this issue, we conclude that defendant failed to demonstrate prejudice and thus was not entitled to relief.

Criminal defendants are constitutionally entitled to effective assistance of counsel during the pleading and plea bargaining stages of a criminal proceeding. (*In re Resendiz* (2001) 25 Cal.4th 230, 239 (*Resendiz*); *In re Alvernaz* (1992) 2 Cal.4th 924, 936-937 (*Alvernaz*); see also U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.)

To establish ineffective assistance of counsel, defendant must show that counsel's performance (1) fell below an objective standard of reasonableness under prevailing professional norms, *and* (2) that defendant suffered prejudice as a result. (*Resendiz*, *supra*, 25 Cal.4th at p. 239; *Alvernaz*, *supra*, 2 Cal.4th at pp. 936-937.)

In the context of pleading guilty,[3] a defendant shows prejudice "by establishing that a reasonable probability exists that, but for counsel's incompetence, he would not have pled guilty and would have insisted, instead, on proceeding to trial." (*Resendiz*, *supra*, 25 Cal.4th at p. 253, citing *Hill v. Lockhart* (1985) 474 U.S. 52, 58-59 [88 L.Ed.2d 203, 209-210].) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*People v. Ledesma* (1987) 43 Cal.3d 171, 218, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674, 698].)

Even if Attorney Atwell gave defendant incomplete advice by failing to mention the federal firearms prohibition, defendant's assertion he would not have pleaded guilty had he been advised correctly cannot be accepted at face value but "'must be corroborated independently by objective evidence.'" (*Resendiz*, *supra*, 25 Cal.4th at p. 253, quoting *Alvernaz*, *supra*, 2 Cal.4th at p. 938.) Factors relevant to this determination include: whether counsel actually and accurately communicated the offer; whether the defendant was amenable to a plea bargain; counsel's advice; and "the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer." (*Ibid.*)

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3 For present purposes, a plea of no contest is considered the same as a plea of guilty. (Pen. Code, § 1016, subd. 3.)

Defendant does not claim that Attorney Atwell inaccurately communicated the district attorney's offer. He was also clearly amenable to plea bargaining, as demonstrated by his willingness to enter into a bargain. We therefore turn to the remaining factors.

A. Counsel's Advice

Prior to entry of the plea, Attorney Atwell advised defendant he could regain all of his rights if he completed probation and successfully moved to reduce the felony to a misdemeanor.[4] This advice was incomplete and potentially misleading, because under federal law, defendant would be categorically banned from possessing firearms as a person convicted of "a crime *punishable* by imprisonment for a term exceeding one year." (18 U.S.C. § 922(g)(1), italics added.) Since federal law looks to the *possible* maximum punishment for a crime rather than the actual sentence imposed, it would be irrelevant if defendant's conviction was later reduced to a misdemeanor. (*United States v. Tallmadge* (9th Cir. 1987) 829 F.2d 767, 771-772; see also *United States v. Pruner* (9th Cir. 1979) 606 F.2d 871, 872-873.)

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4 There is a conflict between defendant's version and Attorney Atwell's version of the conversation. Defendant claimed that Atwell merely said he could regain all of "[his] rights"--which defendant assumed included the right to possess firearms. Atwell testified that he explicitly advised defendant that completion of probation would allow him to regain his right to bear arms under state law, but he neglected to mention the federal firearms prohibition.

Defendant's averment that firearms possession was important to him was uncontradicted. Thus, this factor weighs in defendant's favor.

B. Probable Outcome of Trial

"In determining whether or not a defendant who has pled guilty would have insisted on proceeding to trial had he received competent advice, an appellate court also may consider the probable outcome of any trial, to the extent that may be discerned." (*Resendiz*, *supra*, 25 Cal.4th at p. 254.) In *Resendiz*, the petitioner claimed he would have insisted on going to trial had counsel not misadvised him of the immigration consequences of his plea. (*Id.* at p. 253.) However, the California Supreme Court rejected his habeas petition because "nothing in his declaration or the other evidence he offered indicates how he might have been able to avoid conviction or what specific defenses might have been available to him at trial." (*Id.* at p. 254.)

This case stands on a similar footing. Defendant's declaration stated that because he possessed 27 plants and medical marijuana cards for himself and two other individuals, he believed he was legally within the county's medical marijuana guidelines. No other evidence was offered concerning potential meritorious defenses to the charges.

According to the evidence at the preliminary hearing, defendant was found in possession of "pay-owe" sheets and 101 packages totaling 44.17 *pounds* of marijuana. He admitted

that the physician's recommendation in his possession was forged and gave an inculpatory explanation about why he ran away when the officers approached. Defendant's motion offered no viable defense to the charges of unlawful cultivation and possession of marijuana for sale. Thus, defendant failed to show that his prospects for acquittal were even remotely favorable had he rejected the plea and proceeded to trial.

C. Favorability of the Terms of the Plea Bargain

This factor also weighs decisively against defendant. Under the agreement, defendant received a one-year jail sentence, only 90 days of which would be served in custody, and three years of formal probation. If he completed probation, he would be able to file an unopposed motion to reduce his felony conviction to a misdemeanor.

On the other hand, had defendant proceeded to trial, he faced two felony and three misdemeanor counts. Had defendant been convicted of either charged felony, he would have faced the possibility of several years in state prison (see Health & Saf. Code, §§ 11358, 11359; Pen. Code, §§ 18, 19.2) and been subjected to a lifetime firearms ban under both state and federal law (Pen. Code, § 12021; 18 U.S.C. § 922(g)(1)). Thus, the terms of the plea bargain were highly favorable to defendant.

Conclusion

Defendant failed to submit sufficient objective evidence to corroborate his claim that he would have insisted on going to

trial had he been aware of the federal firearms prohibition. The probable outcome of trial did not bode well for defendant and the bargain he received was quite generous. Although retaining his right to possess firearms might have been important to defendant, a guilty verdict after trial on any of the felony charges would have resulted in the loss of this right just as surely as accepting the plea. (See *Resendiz*, *supra*, 25 Cal.4th at p. 254.) Furthermore, a guilty verdict would have carried the potential for years of state prison, as opposed to only 90 days of actual confinement he would have to serve under the plea agreement.

Defendant has not shown independent, objective evidence sufficient to undermine judicial confidence in his decision to accept the plea bargain. (See *Resendiz*, *supra*, 25 Cal.4th at pp. 254-255.) Because no prejudice was shown, defendant's ineffective assistance claim fails.

II. Direct Versus Collateral Consequences

Defendant also claims that the federal firearms ban was a direct consequence of his plea and the trial court's failure to advise him of this prohibition at the time of the plea bargain entitled him to withdraw his plea.

Trial courts are required to advise defendants of the direct consequences of conviction when they plead guilty. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605 (*Bunnell*).) However, they are not required to advise defendants of

"secondary, indirect or collateral consequences." (*People v. Crosby* (1992) 3 Cal.App.4th 1352, 1355 (*Crosby*).)

Direct consequences include the "permissible range of punishment provided by statute, registration requirements, if any . . . and, in appropriate cases the possibility of commitment pursuant to Welfare and Institutions Code [sections pertaining to narcotic addicts and 'mentally disordered sex offenders']." (*Bunnell*, *supra*, 13 Cal.3d at p. 605.) Some consequences that do not fit squarely within these categories have been held to be direct. For example, restitution is a direct consequence (*People v. Walker* (1991) 54 Cal.3d 1013, 1024) (*Walker*), as is mandatory suspension of the driving privilege (*Corley v. Department of Motor Vehicles* (1990) 222 Cal.App.3d 72, 76).

"A collateral consequence is one which does not 'inexorably follow' from a conviction of the offense involved in the plea." (*Crosby*, *supra*, 3 Cal.App.4th at p. 1355; accord, *Resendiz*, *supra*, 25 Cal.4th at pp. 242-243.) However, some consequences that are not necessarily inexorable are considered direct. (See, e.g., *In re Carabes* (1983) 144 Cal.App.3d 927, 931 [mandatory minimum period of parole is a direct consequence even though it is "not inexorable in the strictest sense," since parole board could theoretically waive parole]; *People v. Lomboy* (1981) 116 Cal.App.3d 67, 70-73 [maximum possible period of commitment following a plea of not guilty by reason of insanity is a direct consequence].)

As the trial court recognized and defendant admits, the law is far from clear in this area. Indeed, California's direct and collateral consequences jurisprudence has been described by one writer as a "judicially created fog." (Note and Comment, *"Guilty, Your Honor": The Direct and Collateral Consequences of Guilty Pleas and the Courts That Inconsistently Interpret Them* (2004) 26 Whittier L.Rev. 305, 306; see also *Resendiz*, *supra*, 25 Cal.4th at p. 242 [recognizing direct and collateral consequences do not have precise definitions].)

However, it is clear that "a defendant (even on direct appeal) is entitled to relief based upon a trial court's misadvisement *only if* the defendant establishes that he or she was prejudiced by the misadvisement, i.e., that the defendant would not have entered the plea of guilty had the trial court given a proper advisement." (*In Re Moser* (1993) 6 Cal.4th 342, 352 (*Moser*), citing *Walker*, *supra*, 54 Cal.3d at pp. 1022-1023, italics added; see also *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 210.) Like a claim for ineffective assistance of counsel, a failure to show prejudice will result in denial of relief. (Cf. *People v. Kipp* (2001) 26 Cal.4th 1100, 1123; *Alvernaz*, *supra*, 2 Cal.4th at p. 945.)

The standard for prejudice in this context is a reasonable probability defendant would not have entered the plea. (*Zamudio*, *supra*, 23 Cal.4th at p. 210; *Moser*, *supra*, 6 Cal.4th at p. 352.) This is essentially the same test that is applied to an ineffective assistance claim. (Cf. *Resendiz*,

supra, 25 Cal.4th at p. 253; *Alvernaz*, *supra*, 2 Cal.4th at pp. 937-939.)

Whether defendant was prejudiced by the trial court's failure to advise is ordinarily "a factual question, appropriate for decision by the trial court in the first instance." (*Zamudio*, *supra*, 23 Cal.4th at p. 210.) However, no remand is necessary. For the reasons discussed in the previous section (see pp. 6-11, *ante*), defendant utterly failed to support his claim that, had he been properly advised, he would have rejected the plea and gone to trial with independent, objective evidence. Accordingly, even if error, the trial court's failure to advise defendant of the federal firearms prohibition must be considered harmless.

III. Inconsistencies and Errors in the Fines and Fees Imposed

The court orally imposed fines and fees which aggregately totaled $1,345. Although the court made no mention of a criminal laboratory analysis fee, the minute order and probation order each impose a fee in the amount of $185. Defendant argues and the Attorney General concedes that this was error.

The $185 laboratory analysis fee was unauthorized. A laboratory analysis fee may be imposed only upon conviction of certain specified offenses. (Health & Saf. Code, § 11372.5, subd. (a).) Defendant's conviction for violating Health and Safety Code section 11366 is not one of them.

Although the court orally imposed $1,345 in fees and the minute order lists the total as $1,380, neither figure is

correct. As defendant points out and the Attorney General agrees, the total amount of fees, after the improper laboratory analysis fee is subtracted, should have been $1,160.

A sentence is unauthorized where it could not lawfully be imposed. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) An appellate court may correct such errors when they come to the court's attention. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) We will order the correction.

DISPOSITION

The judgment is modified to strike the criminal laboratory analysis fee of $185. The total amount of fees after the deletion should be $1,160. The clerk of the superior court shall modify the minute order and probation order accordingly and transmit a copy of the corrected probation order to the probation department. So modified, the judgment is affirmed.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

RAYE, J.